2010

Dennis Cheek v. Clay Bulloch Construction Inc., Clay Bulloch : Reply Brief

Utah Court of Appeals

IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

CASE NO. 20100479-SC

DENNIS CHEEK, Plaintiff and Appellant,

vs.

CLAY BULLOCH CONSTRUCTION INC., a Utah Corporation, and CLAY BULLOCH, an individual, Defendants/Counterclaimants and Appellees.

APPELLANT'S REPLY BRIEF

Appellant's/Plaintiff's Appeal from Ruling on Defendant's Motion to Dismiss for Failure to Prosecute from the Fifth Judicial District Court of Iron County, the Honorable Paul D. Lyman, Civil No. 030500447

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INTRODUCTION

The foundational predicate for most of defendants' arguments is that the trial court made "findings of fact" in conformity with URCivP Rules 41(b) and 52(a). This becomes the spring-board for points 2 through 6 as well as other arguments advanced in defendants' brief. For that reason, it is treated first in this reply.

POINT 1. THE FACT-FINDING RESPONSIBILITY UNDER RULE 41(b) APPLIES ONLY WHEN THE COURT ACTS AS THE "TRIER OF FACTS"

It was important for the trial court to recite the facts on which it based its ruling, but that is not synonymous with the fact-finding function under Rules 41(b) and 52(a). Defendants' position to the contrary is *not supported* by (a) the structure of the case, (b) the court's memorandum decision, (c) the cited rules, (d) the legal authorities cited by defendants, (e) the well-established law defining a "finding of fact," nor (f) the comparable federal rules and the evolution of the same. Each will be examined.

a. Structure of Case

The case did not go to trial. There were no evidentiary hearings. No witnesses were called. There are no credibility issues. All the evidence is in unchallenged written sources in the court file. The manner in which the court handled the undisputed evidence and the legal conclusions reached are the focus of the case.

b. The Memorandum Decision

The court's memorandum decision does not purport to make findings of fact.[1] It begins with this introduction:

[1] At the request of defendants, the court belatedly relabeled its ruling, but that does not change its nature. *See* Argument I, page 25, plaintiff's opening brief.

"The Court has received the defendants' Motion to Dismiss for Failure to Prosecute along with supporting and opposing documents. *The underlying facts relevant to this motion are not disputed.*" Tr. 225. (*Emphasis added*).

The court then set forth the facts that it deemed to be undisputed and on which it based its ruling. There are 53 numbered paragraphs under the heading of "Facts." The first 24 were lifted directly from defendants' memorandum, including defendants' spin. Paragraphs 25 through 39 and 41 through 51 (a total of 25) rely almost entirely on the unrefuted McIff Declaration, but are abridgements which refer only to dates of letters, telephone contacts, and visits while essentially omitting and disregarding the substance thereof. Defendants treat this sifting, abridging and recharacterizing as the "fact-finding" process contemplated by Rules 41(b) and 52(a). The position is misguided.

c. The Fact-Findings Responsibility Under Rule 52(a) and 41(b)

The basic fact-finding responsibility of the court is set forth in URCivP Rule 52. The relevant part of the rule provides:

> **Rule 52. Findings by the court.**
>
> **(a)** ***Effect.*** *In all actions tried upon the facts without a jury* or with an advisory jury, *the court shall find the facts* specially and state separately its conclusions of law thereon, . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. . . . The trial court need not enter findings of fact and conclusions of law in *rulings on motions, except as provided in Rule 41(b).* . . . (*Emphasis added.*)

As the language of 52(a) reveals, the basic responsibility to enter findings of fact and conclusions of law does not exist in motion practice, but arises in the context of a trial where the judge is sitting as the trier of the facts. The noted exception is provided in Rule 41(b). The breadth of that exception is the subject of the analysis which follows.

As a preface to reviewing the language of Rule 41(b), it is noted that it authorizes two types of involuntary dismissals – one on defendant's motion for "failure to prosecute," and the other on defendant's motion "on the grounds that upon the facts and the law the plaintiff has shown no right to relief." A major distinction between the two is that a motion to dismiss for lack of prosecution is not a trial motion where the court evaluates conflicting evidence, resolves disputes, and rules on the merits of the claims. On the other hand, the second motion recognized under Rule 41(b) can only be made when the action is in the process of being tried by the court, without a jury, and then only after the plaintiff has completed the presentation of its evidence. It is in this limited context and only in rendering judgment against the plaintiff, that the court must enter findings of fact and conclusions of law. If carefully read, Rule 41(b) makes this clear:

> **Rule 41. Dismissal of actions.**
>
> . . .
>
> *(b) Involuntary dismissal; effect thereof.* **[1]** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. **[2]** After the plaintiff in an **action tried by the court** without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. **The court as trier of the facts may then determine them and render judgment** against the plaintiff or may decline to render any judgment until the close of all the evidence. **If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).** **[3]** Unless the court in its order for dismissal otherwise specifies, **a dismissal under this subdivision** and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, **operates as an adjudication upon the merits**. (*Emphasis added.*)

The statute has three essential component parts. For ease of reference and to facilitate analysis, the three parts have been preceded with bold numbers in brackets

supplied by counsel. The first component **[1]** deals with a defendant's motion to dismiss for lack of prosecution. It is an independent form of involuntary dismissal which does not reach the merits of plaintiff's claim. The other form of involuntary dismissal **[2]** arises in the context of a trial by the court where the judge actually hears the evidence, adjudicates the merits and grants a non-suit against the plaintiff. In this limited context, *which constitutes the granting of defendant's motion*, the court must make findings as provided in Rule 52(a). The exception in 52(a) for a 41(b) motion makes perfect sense when the court acts as the "trier of the facts," but not otherwise.

The one remaining matter is the impact of a 41(b) dismissal. That is separately treated in the last sentence **[3]** of the rule. Any dismissal under this subdivision "**operates** as an adjudication on the merits." This does not convert a "failure-to-prosecute" review into a trial proceeding requiring adjudication of the merits of plaintiff's claim. It simply sets forth the *consequence* of the dismissal and provides the finality necessary for an appeal. The harsh reality is that if a dismissal is upheld, the most common result is that the plaintiff's claim will never be adjudicated on the merits.

d. Legal Authority Cited By Defendants

In support of its argument that the court made findings of fact in conformity with Rules 41(b) and 52(a), the defendants cite three Utah cases and two cases from federal circuit courts. None of these decisions provides support for the defendants' argument.

Defendants first cite three Utah cases, *Flying Diamond Oil v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989), *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1988), and *Anderson v. Thompson*, 2008 UT App. 3, 176 P.3d 464. Each arises in the context of a bench trial and has no relationship to

Rule 41(b). Each supports the proposition that when a case is tried to the court on the merits there must be adequate findings of fact to support legal conclusions. The principle is correct, but it has no application in this case.

I turn now to the two federal cases which are cited in defendants' brief. The first, *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233 (5th Cir. 1984), contains a strong set of facts regarding the dilatory and contumacious behavior of plaintiff's counsel and resulted in a Rule 41(b) dismissal. Plaintiff's motion for relief from the judgment was conditionally granted on payment of costs, but judgment was reentered when plaintiff failed to comply. An appeal was taken to the Fifth Circuit Court which reversed and remanded with this directive:

> When lesser sanctions have proved futile, a district court may properly dismiss a suit with prejudice. The record does not disclose, however, that the trial judge *considered any alternative sanction . . . , or that the judge determined that alternative to be one that . . . [plaintiff] was capable of performing.* When a district court dismisses an action with prejudice for counsel's failure to prosecute, *such findings of fact* are essential for our consideration of the inevitable argument that the dismissal was an abuse of its discretion.

Id. at 1237, (*emphasis added*). The required findings did not relate to the grounds for dismissal, but to consideration of less severe alternative sanctions and the ability of plaintiff to comply. It can hardly be argued that this provides support for the defendants' position in this case.

The fifth and final case cited by defendants comes from the Seventh Circuit and is styled *Zaddack v. A. B. Dick, Co.*, 773 F.2d 147 (7th Cir. 1985). The lower court entered what it termed "findings of fact," but in reality these were *recitals of undisputed facts* reflecting the "particular procedural history and the situation [of the case] at the time of dismissal." *Id.* at 150. The *Zaddack* court's label does not fit the court's product. As established in the following analysis, the label applied by the court does not control the character of the ruling.

e. The Well-Established Definition of a "Finding of Fact"

Black's Law Dictionary defines a "finding of fact" as "[a] determination of a fact by the court, averred by one party and denied by the other, and founded on evidence in case. [*Citing*] *C.I.T. Corp. v. Elliott*, 66 Idaho 384, 159 P.2d 891, 897 (1945)." *Black's Law Dictionary* Fourth Edition, 1951, page 758.

In 2007 the Idaho Supreme Court had occasion to cite its earlier precedent quoted in *Black's*. In this second treatment, the court clearly distinguishes between the process of *reciting* portions of the record as facts on the one hand and making *findings* of fact on the other:

> In this case, the majority of the City's findings of fact fail to make actual factual findings; instead, the "findings" merely recite portions of the record which could be used in support of a finding. . . . Additionally, several of the findings consist of nothing more than a recitation of testimony given in the record. By reciting testimony, a court or agency does not find a fact unless the testimony is unrebutted in which case the court or agency should so state. "*A finding of fact is a determination of a fact by the court [or agency], which fact is averred by one party and denied by the other and this determination must be founded on the evidence in the case.*" *C.I.T. Corp. v. Elliott*, 66 Idaho 384, 397, 159 P.2d 891, 897 (1945) (internal quotations and citation omitted). . . .

Crown Point Development, Inc. v. City of Sun Valley, 144 Idaho 72, 156 P.3d 573, 578-579 (Idaho 2007). (*Emphasis added.*)

In the within case, the lower court did not hear testimony and did not resolve disputes between what one party averred and the other party denied. The circumstance did not allow for that. Moreover, when it came to the undisputed declaration of plaintiffs' counsel, the court did not accurately recite from the record. Rather, it improperly abridged undisputed facts, significantly changing their substance and import. That is not a fact-finding process but an abuse of discretion by which the court systematically disregarded relevant evidence that runs counter to its ruling.

f. Evolution of Comparable Federal Rules Supports Plaintiff's Construction

The evolution of Federal Rules 41(b) and 52 reveal the fallacy in the position advanced by defendants and support plaintiff's construction of Utah's version of these rules as argued above. For the court's convenience, plaintiff has attached the following addendums:

Addendum 1: 2010 version of Rule 41, Utah Rules of Civil Procedure
Addendum 2: 1987 version of Rule 41, Federal Rules of Civil Procedure
Addendum 3: Current version of Rule 41, Federal Rules of Civil Procedure
Addendum 4: Current version of Rule 52, Federal Rules of Civil Procedure

Utah's 2010 Rule 41(b) language, see Addendum 1, previously quoted and discussed in detail above, is identical to the Federal Rule 41(b) as published in the 1987 edition attached as Addendum 2. The notes of the advisory committee to the federal rules reveal that in 1946 an additional sentence was added to clarify when the court, as trier of the facts, was obliged to enter formal findings of fact. The added sentence provides: "*If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).*" *(Emphasis added.)*

The 1946 amendment was subsequently adopted by Utah and was extensively discussed in *Lawrence v. Bamberger R. Co.*, 282 P.2d 335 (Utah 1955). With respect to the added provision, and relying in part on the advisory committee notes, the *Lawrence* court states:

> It was included by amendment in 1946 to clarify the rule in conformity with the position taken by the Sixth, Seventh, and Ninth Circuits in permitting the trial court to retain his role as trier of facts. Moore [5 *Moore Federal Practice*, at 1045] says: "the amendment clearly adopts the better practice. . . . It is entirely appropriate that the court have the power to weigh the evidence, consider the law, and find for the defendant at the close of the plaintiff's case." . . . The rule clearly indicates that the motion may raise issues of fact as well as law. That is, where the trial is to the court, the motion does not request the judge to take the case from himself as factfinder but permits him to retain that role, and as stated in the rule, "the court as trier of the facts may determine them and . . . make findings . . ."

Id. at 337. In all of this, and in the advisory committee notes included in Addendums 2, 3, and 4, there is never a suggestion that the fact-finding responsibility applies to 41(b) dismissals for failure to prosecute. Such dismissals, under the first sentence of 41(b), stand alone except for the tie to the last sentence of the rule which only describes the *consequence* of the dismissal.

That the foregoing analysis is accurate is confirmed by the 1991 amendments of Federal Rules 41(b) and 52. Rule 41(b) was amended by completely removing what has previously been referred to herein as the "second component part" of the rule dealing with trials to the court and the findings of facts. The amendment moved this part to Rule 52 where it properly fits. In the same amendment, the first and third components of the rule have been joined to become the new 41(b) which deals only with motions to dismiss for lack of prosecution:

> **(b) Involuntary Dismissal; Effect**. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to joint a party under Rule 19 – operates as an adjudication on the merits.

See Addendum 3. The second component part of 41(b) has been relocated to become, in substance, Rule 52(c) which imposes the fact-finding responsibility:

> **(c) Judgment on Partial Findings**. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

See Addendum 4. The advisory committee's note regarding the relocation accomplished by the 1991 amendment is revealing:

> The new subdivision [52(c)] replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential

burden of proof. *Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.*

Id. at page 5, (*emphasis added*). Rules 41(b) and 52(c) are now mutually exclusive. The removal from 52(a) of the exception for motions under Rule 41(b), conclusively establishes that the exception was never intended to apply to motions to dismiss for lack of prosecution which remain viable under 41(b), as amended. It seems inescapably clear that the exception related only to the other 41(b) motion for involuntary dismissal which arose in a bench trial where the court acted as the trier of the facts and was obliged to enter formal findings.

POINT II. PLAINTIFF PRESERVED ALL ISSUES RAISED IN THE APPEAL

Defendants' erroneous assumption regarding the necessity of findings of fact under Rules 41(b) and 52(a), and its erroneous characterization of the trial court's ruling as constituting findings of fact, increase the challenge of formulating a cogent response to defendants' arguments. From these erroneous views, defendants create their own straw man and then attack it. Plaintiff responds to defendants' arguments, but applies the response to the court's ruling as issued rather than to the straw man. Plaintiff will make three points: (a) The trial court abused its discretion in abridging and recharacterizing plaintiff's evidence; (b) defendants erred in asserting that plaintiff was required to file a post-judgment motion for additional findings; and (c) the issues advanced on appeal were raised in the trial court in a timely fashion, clearly identified and adequately briefed.

(a) The Trial Court Abused its Discretion in Abridging and Recharacterizing Plaintiff's Evidence.

Defendants ague that plaintiff has challenged the court's findings of fact as being "incomplete" and "abridged." Defendants then argue that plaintiff was obliged to file a

post judgment motion to obtain more complete and correct findings of fact. Neither of these arguments is well taken.

Defendants refer this court to pages 10 and 32 of plaintiff's opening brief on appeal in support of the claim that plaintiff has challenged the adequacy of the trial court's "findings of fact." Plaintiff has never used language to that effect. Such would presuppose that the evidence before the court was in dispute and that the court was obliged to evaluate competing evidence and find the truth of the matter. That is not the structure of this case. Plaintiff acknowledges using the words "incomplete" and "abridged," but not in the context of fact-findings. Plaintiff has uniformly maintained that the court did not make findings of fact. Rather, plaintiff's complaint relates to the manner in which the trial court treated "undisputed" evidence. Here is what plaintiff said at pages 32-33 which defendants have cited:

> The court also abused its discretion in the arbitrary manner in which it abridged the undisputed declarations of plaintiff's counsel. The abridgement fails to capture the essence of the actual evidence. In many respects, the court's approach renders the story lifeless and strips the very evidence necessary to evaluate the cooperation and diligence — or lack thereof — on the part of the respective parties and their counsel in moving the case toward settlement or trial. All that is left after the court's abridgement is the sterile facts that on such and such dates a telephone call occurred or a letter was written. The consequences of the abuse of discretion attendant to the process of high-grading, summarizing and eliminating vital content will become more fully apparent with the more detailed analysis in the succeeding arguments.

Plaintiff respectfully submits that it is one thing to hear testimony, judge credibility, weigh and evaluate competing evidence, and then make findings of fact, but it is quite another to take undisputed evidence and treat it in a manner that alters its fundamental nature or reduces its persuasive value. That is what happened in this case.

Plaintiff is unaware of any legal support for what the trial court did, and respectfully submits that it constituted an abuse of discretion. *See* arguments II, III and IV in plaintiff's opening brief.

(b) Defendants Erred in Asserting that Plaintiff was Required to File a Post-Judgment Motion

Defendants rely upon *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801, for the proposition that in order to preserve an issue for appeal, "the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on the issue." With that proposition, plaintiff is in full accord and will demonstrate his compliance. Defendants, however, go on to assert that under *State ex rel K.F.*, 2009 UT 4, ¶ 59, 201 P.3d 985, which stems from and generally reinforces *438 Main St.*, plaintiff was obliged to file a post-judgment motion challenging the adequacy of the court's factual findings in order to preserve the issue for appeal. Defendants' analysis stops one case short of the decision controlling this subject matter.

Six months after its decision in *State ex rel K.F.*, the Utah Supreme Court rejected the post-judgment motion argument advanced by defendants, and in the process significantly clarified and refined the law stemming from the *438 Main St.* decision:

> "[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 (citing *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)). An issue is preserved if it is raised in a timely fashion, clearly identified, and adequately briefed. *Id.* "[O]nce trial counsel has raised an issue before the trial court, the trial court has considered the issue, the issue is preserved for appeal." Id. *We impose no specific requirement that "a party . . . file a post-judgment motion before the trial court as a prerequisite to filing an appeal."* *Sittner v. Schriever*, 2000 UT 45, ¶ 16, 2 P.3d 442 (reviewing grant of partial summary judgment even though it was not raised in a postjudgment motion).

Normandeau v. Hanson Equipment, Inc., 2009 UT 44, ¶ 23, 215 P.3d 152, 159, *emphasis added.*

(c) The Issues Advanced on Appeal were Raised in a Timely Fashion, Clearly Identified and Adequately Briefed

The standard adopted in *Normandeau* is relatively simple: "An issue is preserved if it is raised in a timely fashion, clearly identified, and adequately briefed." *Id.*, ¶ 23. The opportunity of the trial court to rule on the disputed issues in this case is not open to serious question. This is so whether the court's 53 numbered statements be considered "findings of fact," as defendants argue, or an effort by the court to identify "undisputed facts," as they were originally labeled. Either way, the subject matter of these 53 statements and the court's mixed conclusions of fact and law based thereon were the essence of the undisputed affidavits, briefing and proceedings in the trial court.

In response to defendants' motion to dismiss, plaintiff filed three documents that satisfy the requirements of *Normandeau.* They are respectively: (1) The under-oath declaration of plaintiff's counsel, Kay McIff, to which were attached several exhibits; (2) plaintiff's memorandum in opposition to defendants' motion; and (3) plaintiff's requested rulings. Every fact claimed by plaintiff and every legal argument advanced by plaintiff in this appeal was presented to the trial court in this documentation.

(1) *The undisputed declaration* of Kay McIff laid before the court contained 36 unchallenged paragraphs detailing what each counsel had done or failed to do in moving the case toward settlement or trial. Supporting exhibits attached reflected contacts

between counsel as well as construction defects, damages sustained, remedial work undertaken and costs incurred for corrective measures.

(2) *Plaintiff's memorandum* quoted verbatim 34 of the 36 paragraphs from the declaration and also set forth the minute entries of the trial court reflecting the interaction with counsel. All of these were analyzed in light of the five factors from *Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.,* 544 P.2d 876 (1975), which the parties agree should control the court's review. The facts before the trial court and the arguments advanced are the same as those advanced in the appeal.

(3) Finally, *plaintiff's "Requested Rulings"* filed with the court and reviewed during oral argument, leaves no room to argue that the issues were not fairly and timely presented to the trial court. The "Requested Rulings," consisting of a two-page document, is attached to this brief under **Addendum 5**. *See* also, Tr. 246-247. Every requested ruling is supported by the evidence cited under plaintiff's "Statement of Facts with Supporting Evidence" which appears at pages 10 through 23 of plaintiff's opening brief. The "Requested Rulings" reflect plaintiff's view of how the trial court should have ruled if it would have applied the correct law to the undisputed facts.

POINT III. THE APPLICABLE STANDARD OF REVIEW WOULD BENEFIT BY INCLUSION OF THE *LEVIN* BALANCING TEST

Plaintiff does not seek to change the standard of review nor to encourage abandoning an extensive body of law dealing with Rule 41(b) motions. Plaintiff, however, reiterates that there is less than complete uniformity and consistency among the decisions and that including the balancing test of *State v. Levin,* 2006 Utah 50, 144 P.3d 1096 would be useful to appellate courts.

Defendants argue that there is no difference between "*a reasonable latitude of discretion*" on one hand and on the other "*'broad discretion'* not to be interfered with unless it '*clearly appears*' that the lower court has abused its discretion." Defendants refer to this as simply a variation in "semantics" used by the courts. Even if that were true, an appellate court is still confronted with the challenge of determining the level and nature of deference that should be accorded the trial court in each case that comes before it. The balancing test adopted in *Levin* is designed to assist the court by guiding this analytical process. It is true that *Levin* was a criminal case, but it is an outgrowth of *State v. Pena*, 869 P.2d 932 (Utah 1994) which has guided appellate deference on mixed questions of law and fact in both criminal and civil cases for many years.

The *Westinghouse* court introduced the five relevant factors with this language:

> It is not to be doubted that *in order to handle business of the court* with efficiency and expedition, the trial court should have a *reasonable latitude of discretion* in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court without justifiable excuse.

544 P.2d at 879, *emphasis added.*

Some forms of dilatory conduct result in missed hearings, continuances of trials, and other matters that have a direct impact on the ability of the trial court to manage its calendar. Other forms relate more to the comparative conduct of the parties in aiding or frustrating the efforts of each other. That is what happened here as revealed by undisputed facts. In this circumstance, the trial court enjoys no evaluative advantage over the appellate court. Accordingly, *Levin* would favor *de novo* review.

Plaintiff respectfully submits that the "*reasonable latitude of discretion*" adopted in *Westinghouse* would be a good fit for application of the *Levin* balancing test, and that

such test would be a useful analytical tool for this court and in future Rule 41(b) cases. Plaintiff stands by the recommendation advanced in its opening brief, but, as stated therein, "the abuse of discretion appears clear whether the court follows *Levin* or applies the standard of review historically employed in Rule 41(b) cases." Footnote 4 at page 25.

POINT IV. DEFENDANTS' OTHER ARGUMENTS RELATE TO LEGAL CONCLUSIONS WHICH ARE REVIEWED FOR CORRECTNESS

As stated in *Gillmor v. Wright*, 850 P.2d 431, 433 (Utah 1993) "On appeal we disregard the labels attached to findings and conclusions and look to the substance. . . . Therefore, that which a trial court labels a 'finding of fact' may in actuality be a conclusion of law which we review for correctness." The trial court made erroneous legal ruling without analysis of the totality of the circumstances, by systematically disregarding plaintiff's evidence, and by failing to apply correct legal principles. The court has broken the case down into three time frames, made cursory conclusions about each, and supplied very little, and sometimes inaccurate support. (*See* Ruling, page 8, Addendum 2, plaintiff's opening brief; also Tr. 225, 232):

> 1. January 2005, to June 2006, there were multiple attempts by the court to keep things moving, but the Plaintiff's attorney failed to produce simple scheduling orders.
> 2. June 2006 to August or September 2008, there was a lengthy attempt to try to get the Plaintiff's [sic] [Defendants'] insurer to pay.
> 3. October 2008 to December 2009, there was no activity.

a. The Court's Conclusion Regarding the First Time Frame and the Production of Orders is Erroneous.

Defendants argue that plaintiff was openly defiant and repeatedly failed to produce multiple orders. The actual evidence shows that the only scheduling order entered was subsequently superseded by settlement negotiations approved by the court.

At the March 14, 2005, scheduling conference, the court entered an order imposing deadlines for discovery, witness identification, the filing of pretrial motions, responses thereon, and the submission of requests for oral argument. Tr. 131. All of this was to occur within 100 days at the conclusion of which there was to be another teleconference. *Id.* Plaintiff's counsel was to prepare a written order. *Id.* Plaintiff acknowledges not having prepared this order, but it became moot by subsequent settlement negotiations, and had long since expired by the time the clerk checked with counsel the following November, some eight months after the scheduling conference.

In its opening brief under IV, page 33-37, plaintiff examines the underlying minute entries which constitute the only evidence on the subject. Defendants are unmoved and continue to argue that plaintiff was reminded three and even four times to prepare the missing order. Rather than support defendants' position and the court's ruling, the subsequent minute entries conclusively establish that after the initial hearing, the court never mentioned the order again. The later minutes reflect that the parties were *engaged in settlement negotiations,* and that the court approved this process.

While the clerk mailed plaintiff's counsel a copy of the case history in June 2005, there were only three actual relevant contacts with the clerk or the judge. They occurred respectively on November 2, 2005, February 26, 2006, and April 5, 2006. The complete respective minute entries are as follows:

> *"**11-02-05** Note: ** clerk checked with counsel; **settlement is still being negotiated**. Tracking extended." (Tr. 132.)*

"*HEARING* [**February 26, 2006**] - - - (continued on next page)

Off record: ***Mr. Allen reports that negotiations are ongoing. There is a possibility of settlement. Mr. Marchant concurs;*** *however he reports that if negotiations are not successful,* ***he will need time to complete more discovery.***

Counsel stipulates to the setting of a ***Telephonic Status Conference*** *within 45 days. Telephonic* ***is set for April 5, 2006*** *at 8:30 a.m. The Court will initiate the call."* Tr. 132-133. *(Emphasis added)*

*"HEARING [****April 5, 2006****]*

Off record: ***Mr. Marchant informs the Court that he will need significant time for discovery.*** *He and Mr. Allen agree to meet to work out a discovery plan and then submit it to the Court.* ***The Court so orders.*** *(case placed on tracking to ensure discovery plan is received)"* Tr. 133. *(Emphasis added.)*

Defendants appear to have relied on the assumption that if repeated enough, the erroneous representation of the content of these teleconferences would be accepted. It appears to have worked in the trial court which opined, "The plaintiff's attorney failed a third time to prepare the order." Tr. 231. The same approach is adopted in defendants' brief on appeal. It states:

> "Furthermore, the plaintiff was reminded by the trial court of his duty to submit a scheduling order on no less than three separate occasions. Plaintiff's complete disregard of the trial court's orders, reminders, directions and rules clearly show a lack of due diligence in prosecuting his case." Defendants' brief at 35.

On appeal, and for the first time in this litigation, defendants allege that plaintiff had a duty to file a scheduling order under Rule 26(f) of the Utah Rules of Civil Procedure. Even if this argument were timely, the only pending matter after the last court hearing was development of a plan for completion of defendants' discovery. (The parties agree that plaintiff's discovery was completed early on, *see* plaintiff's opening brief at 36 and defendants' brief at 15 and 35). Notwithstanding court approval of their request, defendants took no initiative to meet, finalize their discovery plan, or conduct the discovery. Instead they attempt to shift the blame to plaintiff.

b. Defendants Erroneously Treat Settlements Negotiations as "Peripheral" and Irrelevant, While the Trial Court Erroneously Treated or Disregarded the Involvement of Defendants' Counsel and the Lack of Cooperation of the Defendants Themselves.

With respect to the second phase of the case, the court concluded: "June 2006 to August or September 2008, there was a lengthy attempt to try to get the Plaintiff's [sic] [Defendants'] insurer to pay." Tr. 232, quoted above. The evidence of what transpired during the second phase is found in the unrefuted declaration of plaintiff's counsel, Kay McIff, who entered an appearance some seven weeks after the last teleconference and immediately undertook to make contact with defendants' counsel, first by telephone (unsuccessful) and then by letter stating:

> "In any event will you please call me when you receive this letter and let's see if we can chart a course designed to move this case forward. In my view it either needs to be settled or tried." Tr. 176.

Defendants argue that the evidence of the settlement negotiations and communications between counsel, and the evidence reflecting the lack of cooperation by defendants with their own counsel, are "peripheral" and should not be considered because they " do not move the case forward according to the rules and direction of the court." Defendants' brief at page 31-33. The argument fails for several reasons.

First, the trial court has already entered this arena. Twenty-five of its 53 "facts" dealt with contacts and negotiations between counsel after the last court appearance.[2] Second, the first three *Westinghouse* factors expressly require consideration of (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; and (3) what each party has done to

---

[2] However, it is here where the trial court abridged the undisputed facts eliminating all the failings of defendants or their counsel, leaving in only the naked dates of the contacts. See complete comparison of the court's abridged facts followed by the actual facts appearing between page 16, ¶ 25, and page 20, ¶ 40, of plaintiff's opening brief on appeal.

move the case forward. 544. P.2d at 879. Third, and finally, the Supreme Court has rejected the argument that settlement negotiations are irrelevant to the obligation to move the case forward.

In *Utah Oil Co. v. Harris*, 565 P.2d 1165 (Utah 1977) the court had occasion to deal with a similar situation where a pretrial conference was stricken by reason of a compromise settlement. The settlement was apparently never finalized and plaintiff's counsel subsequently withdrew. A notice to obtain new counsel was duly filed. The plaintiff did not immediately retain new counsel but, as revealed in the dissenting opinion, went to the office of defendant's counsel where they engaged in settlement negotiations. After sixteen months, defendant moved to dismiss for lack of prosecution. The trial court granted the motion but the supreme court reversed citing the principles adopted in *Westinghouse*; including particularly the importance of keeping in mind, "*that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.*" 544 P.2d at 879. The court then states:

> Turning now to the issue as to whether or not a lapse of 16 months in prosecuting a claim for relief is sufficient to support a dismissal with prejudice, this court has been active in that area and has held that where all of the litigants had power to obtain relief and failed to do so, it is error to dismiss with prejudice.

565 P.2d at 1137, citing *Crystal Lime and Cement Co. v. Robbins*, 8 Utah 2, 389, 335 P.2d 624 (1959). The *Utah Oil* court then set forth the five *Westinghouse* factors and followed with this:

> Applying the foregoing rules to the case at hand, it is obvious that plaintiffs' lack of diligence in prosecuting over 16 months was *reasonably excusable in light of the settlement efforts* and *had defendants been anxious to proceed they need only have taken such affirmative step themselves*.

(*Id.*, *emphasis added*).

Defendants justify their years of complete inactivity by arguing that under *Hartford Leasing Corp. v. State*, their responsibility is limited to "responding timely to the action,

expeditiously attending to discovery, and moving any counterclaim along." 888 P.2d 694, 702 (Utah App. 1994). Plaintiff considers *Hartford* to be a very useful precedent and hastens to point out that the case before this court stalled when defendants failed to follow through with the discovery which the court had approved for their benefit. In fact, the minute entries from the last two teleconferences with the court support the proposition that progress in the case was essentially on hold pending further discovery by defendants. From that point forward, defendants cannot point to a single act initiated by them, related to further discovery or in "moving their counterclaim along." Moreover, the complacent attitude exhibited by these defendants was not well received in the foundation *Westinghouse* case, 544 P.2d at 879:

> Further, we are not impressed that the defendants themselves were overly diligent or manifest any particular haste in getting the pretrial discovery proceedings completed and on with the trial."

Plaintiff respectfully submits that there is also a common sense element missing from defendants' position that they can simply wait on the sidelines, risk free, while plaintiff works for their benefit, and then hold plaintiff responsible for the delay, even to the point of dismissing plaintiff's claim. This court should consider the following from defendants' brief at page 33:

> Defendants are not suggesting that resubmitting insurance claims and engaging in other similar negotiations are unimportant, however, such actions must be conducted in accordance with the rules, directions, and time frames established by the court. Without compliance to the court's rules and deadlines, there is no urgency to resolve the case and a plaintiff could attempt to twist an insurance company's arms and negotiate every possible issue and avenue of the case, *ad infinitium*.

The immediate answer to defendants' expressed dilemma is found in the *Utah Oil* decision. Defendants were not helpless and could have obtained a scheduling conference at any time with the filing of a simple motion under Rule 26(f)(4) and Rule 16, URCivP. But the larger issue stemming from defendants' observation is their desire to have it both ways. They

want the benefit of the settlement negotiations, while at the same time being able to argue dilatory conduct on plaintiff's part.[3]

Allowing defendants to take advantage of the settlement efforts in their behalf while at the same time building evidence for a Rule 41(b) dismissal flies in the face of common sense and principles of equity. Considerable mischief can be foreseen if settlement efforts are engaged in at the peril of plaintiff being unilaterally held accountable for any delay experienced. Such a standard would discourage settlements and foster incivility.

c. Plaintiff's Justification for the Pace at which the Case has Moved Forward is Woven Throughout the Pages of its Opening Brief and this Brief, Including Particularly this Section.

Defendants seek to avoid all responsibility by belatedly asserting that they "did not have a duty to cooperate with the plaintiff in pursuing a denied insurance claim with their own insurance company." (Defendants' brief at 30.) They further argue that "if at any point plaintiff was frustrated with defendants' alleged unwillingness to pursue renewed efforts with the insurance provider he could have straight way filed a proposed scheduling order and set deadlines to move this case toward trial." *Id.* They make a similar argument with respect to the last year during which they have been represented by new counsel.

The position disregards the fact that defendants' counsel have never taken an uncooperative stance. Defendants' original counsel encouraged the effort with defendants' insurer, sought assistance from plaintiff's counsel on legal issues, and remained verbally committed to the settlement process until forced to withdraw because of the lack of cooperation of

[3] A full summary of the settlement negotiations undertaken by plaintiff's counsel with defendants' counsel and counsel for defendants' insurance carrier is covered with appropriate citations to the record at pages 40-43 of the plaintiff's opening brief on appeal.

his own clients and his resulting inability to assist. If, at any time, defendants' original or current counsel would have signaled a desire to change the course, or an unwillingness to cooperate, plaintiff would have been put on notice, but that did not occur. The undisputed evidence also reveals the participation of defendants' current counsel in formulating the plan actually pursued throughout the last year. The trial court completely disregarded these facts. With respect to this third and final stage, the court erroneously ruled: "October 2008 to December 2009, there was no activity." *See* Ruling, page 8, Addendum 2, plaintiff's opening brief; *also* Tr. 225, 232. What actually happened is set forth in plaintiff's opening brief beginning with italicized paragraph number 22 at the top of page 21 and continuing through italicized paragraph number 36 at the bottom of page 23. This court is requested to review the actual evidence cited.

Defendants now attempt an after-the-fact retraction of the cooperation which has been apparent throughout, and which continued until shortly before Christmas 2009. They would turn the clock back to the end of the preceding March. Defendants argue, "Even if this court determines that the holiday season and plaintiff's counsel's involvement in the 2009 Legislative session were reasonable excuses for failing to move the case forward during that time, the plaintiff does not offer any excuse as to why he failed to move the case forward between March, 2009 and November, 2009." Defendants' brief at page 40. Plaintiff's justification, or "excuse," is that both sides followed the course mutually designed through the meeting of November 24, 2009.

The record does not reveal the date when plaintiff was successful in rescheduling the meeting, only that it resulted from a call from plaintiff's counsel to defendants' counsel in "the fall of 2009," Tr. 173, ¶ 30, *with the meeting for the agreed purposes*

taking place on the agreed date. If the timing was unacceptable, defendants' counsel, who had cancelled the prior meeting, could have solved the problem with a simple telephone call to plaintiff's counsel. Given the civility which existed in the relationship, plaintiff's counsel would reasonably have expected no less. Further, as the court pointed out in *Utah Oil*, "had defendants been anxious to proceed they need only have taken such affirmative steps themselves." 565 P.2d at 1137. Finally, plaintiff does not seek to shift the responsibility to prosecute plaintiff's case, but neither does he want to be caught in a trap fashioned from his allegiance to a course mutually acquiesced in or agreed upon by counsel and followed until shortly before the filing of the 41(b) motion.

POINT V. THE ENDS OF JUSTICE WILL NOT BE SERVED BY DISMISSAL OF PLAINTIFF'S CASE

The fourth and fifth elements of the *Westinghouse* test are "[4] what difficulty or prejudice may have been caused to the other side; and [5] most important, whether injustice may result from the dismissal." 544 P.2d at 879. The court then added:

> It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. *But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.* In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

544 P.2d at 879, *emphasis added.*

With respect to the issue of potential "injustice" the *Hartford* court added:

> We now consider whether Hartford would suffer injustice by not having its day in court, . . . "Dismissal with prejudice . . . is a harsh and permanent remedy when it precludes a presentation of a plaintiff's claims on their merits." *Bonneville Tower Condominium Mgt. Comm. v. Thompson Michie Assocs., Inc.* 728 P.2d 1017, 1020 (Utah 1986). *See Reliable Furniture Co. v. Fidelity & Guar.*

Ins. Underwriters, Inc., 16 Utah 2d 211, 216, 398 P.2d 685, 688 (1965) (pretrial dismissal is "a drastic action . . . used sparingly and with great caution").

888 P.2d at 700. Internal citations remain.

Defendants supply no actual evidence of injury, but rely largely upon assumptions that the "passage of time creates a prejudicial effect;" that "it is increasingly difficult to locate witnesses;" that plaintiff has "sold the building;" that "expert witnesses would have to be retained to determine causes of the alleged defects and the extent of damages incurred by plaintiff," and finally, defendants have incurred "substantial costs in defending themselves for over seven years." Defendants' brief at 42-43.

Defendants' claims are compromised by these facts: (1) Defendants sought, and on April 5, 2006, were granted additional time to conduct more discovery (Tr. 133), but have done nothing to pursue the same; (2) on January, 2008, plaintiff furnished to defendants' counsel a detailed report, with correspondence, engineering information, photographs and data on the construction defects and a summary of actual costs incurred in repairs. Tr. 182-200, *not indexed in proper order*. (3) As the general contractor, defendants have copies of the plans and specification and are fully apprised of variances between the plans and the structure "as built;" (4) plaintiff has also remained named in defendants' lawsuit against him, and his property liened by their *lis pendens;* and (5) given defendants' lack of cooperation with their own counsel and his limited involvement with the case, the court can reasonably infer that plaintiff's attorney fees would have been much greater since his efforts were not aided but rather frustrated by defendants.

Plaintiff respectfully submits that when the first three *Westinghouse* factors are fairly considered, the comparative failures to move the case forward, and the

frustration of the other side's efforts weigh heavily against the defendants. The reverse was true in *PDC Consulting, Inc. v. Porter*, 2008 UT App. 372, 196 P.3d 626, relied upon by defendants, in which plaintiff PDC "[could not] point to anything [defendant] Porter did or failed to do that contributed to PDC's own delays." *Id.* at 630.

Once the trial court determined to limit its focus to plaintiff, the dye was cast. After failing to consider or even mention the lack of cooperation of defendants with their own counsel, the attendant inability and failure of their counsel to assist, followed by the belated reversal of cooperation by current counsel, the court summarily concluded, "[I]t is clear that the defendants have done nothing to hinder the progress of this case." Court Ruling at page 9, Tr. 233, Addendum 1 of plaintiff's opening brief. This conclusion is clearly not supported by the undisputed evidence.

CONCLUSION

Nothing plaintiff has done or failed to do warrants the harsh and permanent penalty of precluding his access to the judicial system. The court of appeals should reverse and remand to the district court for trial on the merits to the end that justice be rendered between the parties.

RESPECTFULLY SUBMITTED this 25th day of April, 2011.

KAY L. MCIFF
ATTORNEY FOR PLAINTIFF/APPELLANT

CERTIFICATE OF MAILING

I hereby certify that on the 25 day of April, 2011, I served an original and seven copies of the **APPELLANT'S REPLY BRIEF** on the Utah Court of Appeals by first class mail addressed to:

The Utah Court of Appeals
450 South State Street
PO Box 140210
Salt Lake City, UT 84114-0210

I further certify that on the 25 day of April, 2011, I served two copies of the **APPELLANT'S REPLY BRIEF** by first class mail addressed to:

V. Lowry Snow
J. Gregory Hardman
Tonaquint Business Park, Bldg. B
912 West 1600 South, Suite 200
St. George, UT 84770

KT Turner

Tab 1

RULE 41

DISMISSAL OF ACTIONS

UTAH RULES OF CIVIL PROCEDURE 2010

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*

(a)(1) *By plaintiff.* Subject to the provisions of Rule 23(e) and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(a)(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) *Bond or undertaking to be delivered to adverse party.* Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

(Amended effective November 1, 1997; April 1, 2008.)

Tab 2

1987 Edition

Supersedes 1986 Edition

Federal CIVIL JUDICIAL PROCEDURE and RULES

FEDERAL RULES:

CIVIL PROCEDURE
MULTIDISTRICT LITIGATION RULES
HABEAS CORPUS RULES—28 §§ 2254 & 2255
TEMPORARY EMERGENCY COURT OF APPEALS
EVIDENCE
APPELLATE PROCEDURE
SUPREME COURT RULES

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

ADVISORY COMMITTEE NOTES ON RULES
REVISERS' NOTES ON TITLE 28

Summary of Features on back cover

WEST PUBLISHING COMPANY

1987 EDITION

FEDERAL CIVIL JUDICIAL PROCEDURE and RULES

as amended to May 1, 1987

Rules of Civil Procedure
Rules of Judicial Panel on Multidistrict Litigation
Rules Governing Title 28 Section 2254 Cases
Rules Governing Title 28 Section 2255 Proceedings
Rules of Temporary Emergency Court of Appeals
Rules of Evidence
Rules of Appellate Procedure
Rules of the Supreme Court

Title 28, Judiciary and Judicial Procedure
Appendices:
- App. I—Act June 25, 1948, c. 646, §§ 2 to 39
- App. II—Judicial Personnel Financial Disclosure Requirements
- App. III—Development of Mechanisms for Resolving Minor Disputes
- App. IV—Bankruptcy Reform Act of 1978—Transition Provisions

Consolidated Index

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with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

NOTES OF ADVISORY COMMITTEE ON RULES

The provisions for express waiver of jury trial found in U.S.C., Title 28, former § 773 (Trial of issues of fact; by court) are incorporated in this rule. See Rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, former § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co.* v. *Condon Nat. Bank*, 260 U.S. 235, 43 S.Ct. 118, 67 L.Ed. 232 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif.Code Civ.Proc. (Deering, 1937) § 592; 1 Colo.Stat. Ann. (1935) Code Civ.Proc., Ch. 12, § 191; Conn.Gen.Stat. (1930) § 5625; 2 Minn.Stat. (Mason, 1927) § 9288; 4 Mont.Rev.Codes Ann. (1935) § 9327; N.Y.C.P.A. (1937) § 430; 2 Ohio Gen.Code Ann. (Page, 1926) § 11380; 1 Okla.Stat.Ann. (Harlow, 1931) § 351 [12 Okl.St.Ann. § 557]; Utah Rev.Stat.Ann. (1933) § 104–23–5; 2 Wash. Rev.Stat.Ann. (Remington, 1932) § 315; Wis.Stat. (1935) § 270.07. See former Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28, former § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co.* v. *Savannah River Lumber Co.*, C.C.A.4, 1922, 280 F. 358; *Fed. Res. Bk. of San Francisco* v. *Idaho Grimm Alfalfa Seed Growers' Ass'n,*, C.C. A.9, 1925, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778; *Watt* v. *Starke*, 1879, 101 U.S. 247, 25 L.Ed. 826.

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

NOTES OF ADVISORY COMMITTEE ON RULES

U.S.C., Title 28, former § 769 (Notice of case for trial) is modified. See former Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also former Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, formerly § 47 (now §§ 1253, 2101, 2325) (Injunctions as to orders of Interstate Commerce Commission); formerly § 380 (now §§ 1253, 2101, 2284) (Injunctions alleged unconstitutionality of state statutes); formerly § 380a (now §§ 1253, 2101, 2284) (Same; Constitutionality of federal statute); former § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) ***By Plaintiff; by Stipulation.*** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) ***By Order of Court.*** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party

under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). Compare Ill.Rev.Stat. (1937) c. 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U.S.C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

Note to Subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

1946 AMENDMENT

Note to Subdivision (a). The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 Moore's Federal Practice, 1938, 3037–3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b).

Subdivision (b). In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young* v. *United States*, C.C.A.9, 1940, 111 F.2d 823; *Gary Theatre Co.* v. *Columbia Pictures Corporation*, C.C.A.7, 1941, 120 F.2d 891; *Bach* v. *Friden Calculating Machine Co., Inc.*, C.C.A.6, 1945, 148 F.2d 407. Cf. *Mateas* v. *Fred Harvey, a Corporation*, C.C.A.9, 1945, 146 F.2d 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp.* v. *Mason*, C.C.A.3, 1940, 115 F.2d 548; *Schad* v. *Twentieth Century-Fox Film Corp.*, C.C.A.3, 1943, 136 F.2d 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 Moore's Federal Practice, 1938, Cum.Supplement § 41.03, under "Page 3045"; Commentary, The Motion to Dismiss in Non-Jury Cases, 1946, 9 Fed.Rules Serv., Comm.Pg. 41b.14.

1963 AMENDMENT

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien* v. *Westinghouse Electric Corp.*, 293 F.2d 1, 5–10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to non-jury cases (including cases tried with an advisory jury). Hereafter the correct

motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 Moore's Federal Practice ¶ 59.08[5] (2d ed. 1954); cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as non-jury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello* v. *United States*, 365 U.S. 265, 284-288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow* v. *Hinde*, 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); Restatement of Judgments § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

1966 AMENDMENT

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

1968 AMENDMENT

The amendment corrects an inadvertent error in the reference to amended Rule 23.

1987 AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (a) is based upon U.S.C. Title 28, former § 734 (Orders to save costs; consolidation of causes of like nature) but in so far as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) § 1081; Cal.Code Civ.Proc. § 1048; N.M.Stat.Ann. (Courtright, 1929), § 105-828; N.Y.C.P.A. (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV, (1919) Art. 26.

For severance or separate trials, see Calif.Code Civ. Proc. § 1048; N.Y.C.P.A. (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art. 3, § 2 and Art. 10, § 10. See also the third sentence of former Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

1966 AMENDMENT

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, Routine Bifurcation of Negligence Trials, 14 Vand. L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g.*, *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

Rule 43. Taking of Testimony

(a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(b), (c) [Abrogated]

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the

Tab 3

FED- 2011, RULE 41

Rule 41. Dismissal of Actions
United States Code Annotated Federal Rules of Civil Procedure for the United States District Courts

Title VI. Trials

Federal Rules of Civil Procedure Rule 41

Rule 41. Dismissal of Actions

NOTES OF DECISIONS (1804)

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal--or state--court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied

Credits

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). Compare Ill.Rev.Stat. (1937) c. 110, § 176, and *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U.S.C., Title 8, § 164 [see 1329] (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, § 232 [now 3730] (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

Note to Subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

1946 Amendment

Note. Subdivision (a). The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 *Moore's Federal Practice*, 1938, 3037-3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b).

Subdivision (b). In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young v. United States*, C.C.A.9, 1940, 111 F.2d 823; *Gary Theatre Co. v. Columbia Pictures Corporation*, C.C.A.7, 1941, 120 F.2d 891; *Bach v. Friden Calculating Machine Co., Inc.*, C.C.A.8, 1945, 148 F.2d 407. Cf. *Mateas v. Fred Harvey, a Corporation*, C.C.A.9, 1945, 146 F.2d 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp. v. Mason*, C.C.A.3, 1940, 115 F.2d 548; *Schad v. Twentieth Century-Fox Film Corp.*, C.C.A.3, 1943, 136 F.2d 991. The added sentence in

Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 *Moore's Federal Practice*, 1938, Cum.Supplement § 41.03, under "Page 3045"; Commentary, *The Motion to Dismiss in Non-Jury Cases*, 1946, 9 Fed.Rules Serv., Comm.Pg. 41b.14.

1963 Amendment

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien v. Westinghouse Electric Corp.*, 293 F.2d 1, 5-10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 *Moore's Federal Practice* ¶59.08[5] (2d ed. 1954); *cf. Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello v. United States*, 365 U.S. 265, 284-288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); *Restatement of Judgments* § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

1966 Amendment

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

1968 Amendment

The amendment corrects an inadvertent error in the reference to amended Rule 23.

1987 Amendment

The amendment is technical. No substantive change is intended.

1991 Amendment

Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally

insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

2007 Amendment

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended to reflect the Rule 23 changes. In 1968 Rule 41(a)(1) was amended to correct the cross-reference to what had become Rule 23(e), but Rules 23.1 and 23.2 were inadvertently overlooked. Rules 23.1 and 23.2 are now added to the list of exceptions in Rule 41(a)(1)(A). This change does not affect established meaning. Rule 23.2 explicitly incorporates Rule 23(e), and thus was already absorbed directly into the exceptions in Rule 41(a)(1). Rule 23.1 requires court approval of a compromise or dismissal in language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice of dismissal.

Notes of Decisions (1804)

Amendments received to 7-15-2010.

End of Document

Tab 4

FED - 2011, RULE 52

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings
United States Code Annotated Federal Rules of Civil Procedure for the United States District Courts

Title VI. Trials

Federal Rules of Civil Procedure Rule 52

Rule 52. Findings and Conclusions by the Court; Judgment on Partial

Currentness

(a) Findings and Conclusions.

(1) ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Credits

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 28, 1983, effective August 1, 1983; April 29, 1985, effective August 1, 1985; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 27, 1995, effective December 1, 1995; April 29, 2002, effective December 1, 2003;

NOTES OF DECISIONS (3186)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

See [former] Equity Rule 70 ½, as amended Nov. 25, 1935, (Findings of Fact and Conclusions of Law) and U.S.C., Title 28, [former] § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, [former] §§ 773 (Trial of issues of fact; by court) and [former] 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.*, C.C.A.8, 1913, 204 F. 166, certiorari denied 33 S.Ct. 1051, 229 U.S. 624, 57 L.Ed. 1356; *Warren v. Keep*, 1894, 15 S.Ct. 83, 155 U.S. 265, 39 L.Ed. 144; *Furrer v. Ferris*, 1892, 12 S.Ct. 821, 145 U.S. 132, 36 L.Ed. 649; *Tilghman v. Proctor*, 1888, 8 S.Ct. 894, 125 U.S. 136, 149, 31 L.Ed. 664; *Kimberly v. Arms*, 1889, 9 S.Ct. 355, 129 U.S. 512, 524, 32 L.Ed. 764. Compare *Kaeser & Blair Inc. v. Merchants' Ass'n*, C.C.A.6, 1933, 64 F.2d 575, 576; *Dunn v. Trefry*, C.C.A.1, 1919, 260 F. 147.

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) § 364; California, Code Civ.Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp.Laws (Hillyer, 1929) §§ 8783-8784; New Jersey, Sup.Ct.Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) §§ 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp.Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) §§ 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp.Laws (1929) §§ 2525-2526; Utah, Rev.Stat.Ann. (1933) §§ 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub.Laws (1933) § 2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ.Proc. (Derring, 1937) § 956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson v. Kountze*, 1895, 43 P. 445, 21 Colo. 486, semble; Illinois, *Baker v. Hinricks*, 1934, 194 N.E. 284, 359 Ill. 138; *Weininger v. Metropolitan Fire Ins. Co.*, 1935, 195 N.E. 420, 359 Ill. 584, 98 A.L.R. 169; Minnesota, *State Bank of Gibbon v. Walter*, 1926, 208 N.W. 423, 167 Minn. 37; *Waldron v. Page*, 1934, 253 N.W. 894, 191 Minn. 302; New Jersey N.J.S.A. 2:27-241, 2:27-363 as interpreted in *Bussy v. Hatch*, 1920, 111 A. 546, 95 N.J.L. 56; New York, *York Mortgage Corporation v. Clotar Const. Corp.*, 1930, 172 N.E. 265, 254 N.Y. 128; North Dakota, Comp.Laws Ann. (1913) § 7846, as amended by N.D.Laws 1933, c. 208; *Milnor Holding Co. v. Holt*, 1933, 248 N.W. 315, 63 N.D. 362, 370; Oklahoma, *Wichita Mining and Improvement Co. v. Hale*, 1908, 94 P. 530, 20 Okl. 159; South Dakota, *Randall v. Burk Township*, 4 S.D. 337, 57 N.W. 4 (1893); Texas, *Custard v. Flowers*, 1929, 14 S.W.2d 109; Utah, Rev.Stat.Ann. (1933) § 104-41-5; Vermont, *Roberge v. Troy*, 1933, 163 A. 770, 105 Vt. 134; Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§ 309-316; *McCullough v. Puget Sound Realty Associates*, 1913, 136 Pac. 1146, 76 Wash. 700, but see *Cornwall v. Anderson*, 1915, 148 P. 1, 85 Wash. 369; West Virginia, *Kinsey v. Carr*, 1906, 55 S.E. 1004, 60 W.Va. 449, semble; Wisconsin, Stat. (1935) § 251.09; *Campbell v. Sutliff*, 1927, 214 N.W. 374, 193 Wis. 370; *Gessler v. Erwin Co.*, 1924, 193 N.W. 303, 182 Wis. 315.

jury to the review at law as made in several states, see Clark and Stone, *Review of Findings of Fact,* 4 U. of Chi.L.Rev. 190, 215 (1937).

1946 Amendment

Note to Subdivision (a). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 *Moore's Federal Practice,* 1938, 3119. *Hurwitz* v. *Hurwitz,* 1943, 136 F.2d 796, 78 U.S.App.D.C. 66.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, e.g., *United States* v. *One 1941 Ford Sedan,* S.D.Tex.1946, 65 F.Supp. 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc.* v. *Bruns Publications,* S.D.N.Y.1939, 28 F.Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities* v. *Cincinnati & L.E.R. Co.,* S.D.Ohio 1941, 43 F.Supp. 5; *United States* v. *Aluminum Co. of America,* S.D.N.Y.1941, 2 F.R.D. 224, 5 Fed. Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman* v. *United States,* D.Mass.1938, 25 F.Supp. 868; *Cook* v. *United States,* D.Mass.1939, 26 F.Supp. 253; *Proctor* v. *White,* D.Mass.1939, 28 F.Supp. 161; *Green Valley Creamery, Inc.* v. *United States,* C.C.A.1, 1939, 108 F.2d 342. See also *Matton Oil Transfer Corp.* v. *The Dynamic,* C.C.A.2, 1941, 123 F.2d 999; *Carter Coal Co.* v. *Litz,* C.C.A.4, 1944, 140 F.2d 934; *Woodruff* v. *Heiser,* C.C.A.10, 1945, 150 F.2d 869; *Coca Cola Co.* v. *Busch,* Pa.1943, 7 Fed. Rules Serv. 59b.2, Case 4; Oglebay, *Some Developments in Bankruptcy Law,* 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, *Hurwitz* v. *Hurwitz,* App.D.C.1943, 136 F.2d 796, 78 U.S.App.D.C. 66, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law,* 1 F.R.D. 25, 26-27; *United States* v. *Forness,* C.C.A.2, 1942, 125 F.2d 928, certiorari denied 1942, 62 S.Ct. 1293, 316 U.S. 694, 86 L.Ed. 1764. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States* v. *Forness,* supra; *United States* v. *Crescent Amusement Co.,* 1944, 1945, 65 S.Ct. 254, 323 U.S. 173, 89 L.Ed. 160. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp.* v. *The Dynamic,* supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. *United States* v. *Forness,* supra; *United States* v. *Crescent Amusement Co.,* supra. See also *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.,* C.C.A.2, 1942, 126 F.2d 992; *Brown Paper Mill Co., Inc.* v. *Irwin,* C.C.A.8, 1943, 134 F.2d 337; *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.,* C.C.A.2, 1944, 145 F.2d 215, reversed on other grounds 65 S.Ct. 1533, 325 U.S. 797; *Young* v. *Murphy, Ohio* 1946, 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see *Thomas* v. *Peyser,* App.D.C.1941, 118 F.2d 369; *Schad* v. *Twentieth Century-Fox Corp.,* C.C.A.3, 1943, 136 F.2d 991; *Prudential Ins. Co. of America* v. *Goldstein,* N.Y.1942, 43 F.Supp. 767; *Somers Coal Co.* v. *United States,* N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp.* v. *Warfield Natural Gas Co.,* E.D.Ky.1942, 2 F.R.D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, *Necessity of Findings of Fact,* 1941, 4 Fed. Rules Serv. 936.

1963 Amendment

Note to Rule 58, as amended.

1983 Amendment

Rule 52(a) has been amended to revise its penultimate sentence to provide explicitly that the district judge may make the findings of fact and conclusions of law required in nonjury cases orally. Nothing in the prior text of the rule forbids this practice, which is widely utilized by district judges. See Christensen, *A Modest Proposal for Immeasurable Improvement*, 64 A.B.A.J. 693 (1978). The objective is to lighten the burden on the trial court in preparing findings in nonjury cases. In addition, the amendment should reduce the number of published district court opinions that embrace written findings.

1985 Amendment

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 Va.L.Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., *Marcum v. United States*, 621 F.2d 142, 144-45 (5th Cir.1980). Others go further, holding that appellate review may be had without application of the "clearly erroneous" test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, *e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir.), cert. denied, 459 U.S. 880 (1982); *Lydle v. United States*, 635 F.2d 763, 765 n. 1 (6th Cir.1981); *Swanson v. Baker Indus., Inc.*, 615 F.2d 479, 483 (8th Cir.1980); *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir.1979), cert. denied, 445 U.S. 946 (1980); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir.1979); *John R. Thompson Co. v. United States*, 477 F.2d 164, 167 (7th Cir.1973).

A third group has adopted the view that the "clearly erroneous" rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, *e.g., Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States v. Texas Education Agency*, 647 F.2d 504, 506-07 (5th Cir.1981), *cert. denied*, 454 U.S. 1143 (1982); *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir.1980); *In re Sierra Trading Corp.*, 482 F.2d 333, 337 (10th Cir.1973); *Case v. Morrisette*, 475 F.2d 1300, 1306-07 (D.C.Cir.1973).

The commentators also disagree as to the proper interpretation of the Rule. *Compare* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn.L.Rev. 751, 769-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), *and* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 2587*, at 740 (1971) (language of the Rule is clear), *with* 5A J. Moore, *Federal Practice* ¶ 52.04, 2687-88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not clearly resolved the issue. See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1958 (1984); *Pullman Standard v. Swint*, 456 U.S. 273, 293 (1982); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948).

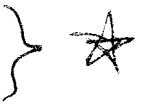
The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of

findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

1991 Amendment

Subdivision (c) is added. It parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.



As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence.

Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be "clearly erroneous." A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on questions of law as provided in Rule 56(a) and are not shielded by the "clear error" standard of review.

1993 Amendments

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, similar to the revision being made to Rule 50. This amendment makes clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

1995 Amendments

The only change, other than stylistic, intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used--rather than "within"--to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

2007 Amendments

The language of Rule 52 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 52(a) said that findings are unnecessary on decisions of motions "except as

unnecessary "unless these rules provide otherwise." This change reflects provisions in other rules that require Rule 52 findings on deciding motions. Rules 23(e), 23(h), and 54(d)(2)(C) are examples.

Amended Rule 52(a)(5) includes provisions that appeared in former Rule 52(a) and 52(b). Rule 52(a) provided that requests for findings are not necessary for purposes of review. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Rule 52(b), applicable to findings "made in actions tried without a jury," provided that the sufficiency of the evidence might be "later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." Former Rule 52(b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended Rule 52(a)(5) makes explicit the application of this part of former Rule 52(b) to interlocutory injunction decisions.

Former Rule 52(c) provided for judgment on partial findings, and referred to it as "judgment as a matter of law." Amended Rule 52(c) refers only to "judgment," to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c).

2009 Amendments

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Notes of Decisions (3186)

Amendments received to 7-15-2010.

End of Document

Tab 5

Requested Rulings:

1. A discovery and scheduling order was entered in open court on March 13, 2005. It allowed 100 days, or until June 22, 2005 to run its course.

2. On Nov. 2, 2005, the court clerk "checked with counsel" and was advised that "settlement is still being negotiated."

3. On February 22, 2006 a scheduling conference was held. Counsel advised the court that "negotiations are ongoing" and that "there is a possibility of settlement."

4. At the scheduling conference, Defendants' counsel advised the court that if the negotiations were not successful, he would "need time to complete more discovery."

5. Also on February 22, 2006 a follow-up "Status" was scheduled for April 5, 2006.

6. On April 5, 2006 the follow-up status conference was held. Defendants' counsel advised the court that he would "need significant time for discovery." Counsel mutually agreed to meet and work out a discovery plan and submit it to the court.

7. The court approved the plan by its order.

8. The original scheduling order entered in open court on March 13, 2005, and which extended only for 100 days, was necessarily superseded by the settlement negotiations, ongoing in November of 2005 when the clerk checked with counsel, and continuing through the "Status" conference with the court on February 22, 2006.

9. The only outstanding order of the court is the one entered on April 5, 2006 which approved Defendants' "need [for]] significant time for discovery" and the agreement of counsel "to meet to work out a discovery plan and submit it to the court."

10. Some two months after the last court hearing and entry of the outstanding order regarding discovery, Plaintiff's counsel withdrew and the McIff Firm entered an appearance for Plaintiff.

11. The unrefuted declaration of attorney Kay McIff reflects a series of telephone calls and letters designed to move the settlement efforts of the parties forward.

12. Attorney McIff also volunteered to assist Defendants' counsel in negotiations with Defendants' insurance carrier. The assistance was welcomed but appears not to have been aided by Defendants.

13. On multiple occasions Defendants' counsel advised that Defendant was uncooperative and would not even come to meet with counsel.

14. In an effort to assist, the McIff Firm prepared a lengthy report with accompanying exhibits and furnished copies to Defendants' counsel and counsel representing Defendants' insurance carrier.

15. After some two years during which the McIff Firm attempted to work with Defendants' counsel, Mr. Marchant, the latter filed a notice of withdrawal dated Sep. 12, 2008.

16. On Oct. 8, 2010, Lowry Snow entered an appearance of counsel for Defendants.

17. On Oct. 10, 2010 the McIff Firm prepared and served on opposing counsel a motion for a scheduling conference. For some unknown reason the motion does not appear on the court docket, but the parties were in contact with each other in relation to the same.

18. After Mr. Snow came on board, he and Mr. McIff agreed to meet, review the facts and relevant considerations and together work out a recommended approach for proceeding with the case.

19. McIff and Snow eventually met in Cedar City, reviewed the pleadings, some of the correspondence – particularly the report and exhibits that McIff had prepared for the other side.

20. McIff and Snow also visited the construction site and examined areas of dispute. They discussed the need for a scheduling conference and steps they may take in moving forward.

21. Plaintiff subsequently filed a motion for a scheduling conference, and Defendants filed a motion to dismiss for lack of prosecution.

22. Both sides have pointed the court to the case of *Westinghouse Elec. Co. v. Larsen,* 544 P.2d 876 (1975). It requires the court to evaluate the comparative conduct of the parties.

23. Factors in the present case:

- only affirmative steps since order of April 5, 2006: Plaintiff
- focus of last court order was Defendants' discovery needs – Defendants have done nothing
- Defendants have been uncooperative with their own counsel
- Defendants do not come to court with clean hands
- A stream of telephonic contacts and letters were all initiated by Plaintiff
- Two motions for scheduling conferences have been advanced by Plaintiff
- Multiple trips to St. George and Cedar City have been undertaken by Plaintiff's counsel
    * Watson in St. George
    * Marchant in Cedar City
    * Snow in Cedar City
- Plaintiff's counsel cannot identify one affirmative act initiated by Defendants since April 5, 2006 designed to move settlement or litigation forward.